

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

OLEN MAFFETT POUND d/b/a
COLES POINT MARINA,
Plaintiff

V.

NO. 2:92CV100-B-O

HULL AND COMPANY, INC., et al.,
Defendants

ORDER

This cause comes before the court on the defendants' motion to amend the pretrial order and the defendants' motion in limine, motion to preclude evidence, and in the alternative, motion to reopen discovery, and motion to bifurcate trial. The plaintiff has responded to only the motion to amend the pretrial order.

Motion to Amend

The defendants move for leave of court to include in the pretrial order Exhibits 22a-c, videotapes taken by the Corps of Engineers. At the time of his response, the plaintiff had not been furnished the videotapes. Therefore, the court reserves ruling on this motion. The defendants are Directed to furnish the videotapes or copies thereof to the plaintiff within five days, if they have not done so. The videotapes will be admitted unless the plaintiff supplements his response setting forth valid objections within twenty days after receipt of the videotapes or within twenty days of the date of this order if the plaintiff has been previously furnished the proposed exhibits.

Motion in limine

The defendants move to exclude certain documents and the testimony of certain witnesses listed in the pretrial order on the ground that they were not produced or identified in response to discovery requests. The defendants alternatively move for leave to depose the witnesses in dispute and any persons identified in the documents.

Samuel L. Jaynes is listed as a fact witness in the pretrial order. The defendants assert that Jaynes is expected to testify about various claims for damages specified in its interrogatory no. 10(c), (d), and (e) and that Jaynes was not identified as a person having knowledge of those matters. David Hill is listed as a fact witness for the plaintiff. The defendants assert that Hill was not identified in response to interrogatory no. 5 requesting the identity of all persons having knowledge of any business dealings with the government, including the plaintiff's lease with the United States Corps of Engineers, maintenance of the marina, the eviction and demand for clean-up costs by the Corps of Engineers. The defendants object to any expert testimony of Raymond Belk and Jim Matthews who are listed as fact witnesses in the pretrial order. The defendants assert that Belk was the plaintiff's accountant and is expected to offer his expert opinion regarding the plaintiff's alleged loss of income. The defendants assert that Matthews, an insurance adjuster, is expected to testify as to his evaluation of the plaintiff's loss and the cost of replacing the

marina. Belk and Matthews are not identified in the plaintiff's response to the standard expert interrogatory (no. 12) propounded by the defendants.¹ The plaintiff's response identifies only Brian Pray, a certified real estate appraiser who appraised Coles Point Marina. His response further states:

It is anticipated that an additional expert may be retained to establish the value of the marina business. This response will be supplemented if and when such an expert in [sic] retained.

No other expert witness was identified.

Requests for production of documents Nos. 3, 5, 14, and 18 propounded by the defendants request all documents pertaining to the plaintiff's application for marina insurance, his claim arising out of the alleged second storm in February, 1991 (second claim for additional storm damage under the property damage policy), and denial of coverage under the liability policy. The defendants object to exhibit P-4 in part (the plaintiff's two claims submitted under the property policy) on the ground that the second claim was not produced during discovery. The defendants object to exhibits P-15 (photographs of the leased area taken by adjuster Matthews), P-16 (Matthews' entire file), and P-26 (Security Blanket Insurance

¹The defendants do not object to Matthews' testimony in the pretrial order filed subsequent to the filing of the instant motion. However, the defendants do object in the pretrial order to trial exhibit P-16, Matthews' file, on several grounds including conclusions contained in the file which would require expert testimony.

Agency's policy and claim file) on the grounds that these documents were not produced in response to the above-referenced requests for production of documents. The plaintiff produced exhibits P-16 and P-26 during the final pretrial conference four months after the close of discovery.

The defendants move to exclude the above-referenced documents and the testimony of the above-referenced witnesses on the ground of unfair surprise and, in the alternative, for leave to depose the named witnesses and any potential witnesses identified in the challenged documents. The trial of this cause was initially set on February 7, 1994 and has been reset on two occasions. On the plaintiff's motion, the most recent trial setting of November 14, 1994 has been continued until further notice. "Amendments to interrogatory answers are mandated by the Federal Rules of Civil Procedure [rule 26(e)] and are to be made seasonably." Carter v. MOOG Automotive, Inc. 126 F.R.D. 557, 559 (E.D. Mo.) (exclusion of twenty witnesses "not previously identified during the discovery stage," as well as 32 exhibits), aff'd, 1989 U.S. App. Lexis 19, 983 (8th Cir. 1989). Since the plaintiff has not responded to the instant motion,² there has been no showing of the reasons for the

² The United States Magistrate Judge issued an order directing the filing of all motions in limine ten calendar days before trial and all responses five calendar days before trial. At the time the instant motion was filed, the trial was scheduled within two months. In a supplemental motion for continuance filed on April 13, 1994, the plaintiff stated that his counsel was attempting to respond to the instant motion. The plaintiff was granted a

plaintiff's failure to timely disclose the identity of persons listed as trial witnesses and produce the documents listed as trial exhibits during the discovery phase.

Disclosure at the final pretrial conference did not cure the deficiency in the plaintiff's discovery responses. The purpose of the pretrial conference and the purpose of discovery are separate and distinct:

The Local Rule speaks to identifying witnesses who are to testify at trial, while the interrogatories address the question of persons having knowledge of certain facts relevant to the issues in the case, not whether they will testify or not. The purpose of requiring a listing of persons with knowledge, even early on during the discovery phase in response to interrogatories, is to allow the opposing party to interview or depose them, if desired, or to conduct other investigation, and to learn the facts before discovery closes.

Pearce v. E.F. Hutton Group, Inc., 117 F.R.D. 480, 481 (D.D.C. 1987) (precluding the trial testimony of sixteen witnesses on the ground of the plaintiff's vague and general interrogatory responses). The court in Pearce stated:

[The purpose of discovery] was completely frustrated here by plaintiff's completely unwarranted and unjustified lack of diligence in supplying the names of persons plaintiff

continuance and has had more than adequate time to respond but has not done so. Since the instant motion alternatively seeks leave to reopen discovery, it is not simply a motion in limine within the scope of the magistrate judge's order. In light of the alternative relief sought by the defendants, the court cannot wait until five days before trial to rule.

knew had knowledge about facts within the scope of the interrogatories at issue.

Id. See Holiday Inns, Inc. v. Robertshaw Controls Co., 560 F.2d 856, 858 (7th Cir. 1977) (precluding proof of the plaintiff's alternative theory of recovery not properly asserted in supplemental interrogatory answers).

Trial was imminent at the time of the evidentiary rulings in Pearce and Holiday Inns, Inc.. This cause was filed on June 23, 1992 and the discovery deadline was originally May 31, 1993 and extended to August 23, 1993 on the plaintiff's motion. The witnesses and exhibits in dispute were not disclosed until the final pretrial conference on December 28, 1993. The record reflects no attempt on the part of the plaintiff at the conference or at any time to justify his deficient discovery responses. The court finds that reopening discovery at this juncture, as an alternative to exclusion of evidence not timely disclosed during discovery, would needlessly postpone the trial of this more than two-year-old action and defeat the purpose of the scheduling order. Since the defendants will not have an opportunity to conduct further discovery, admission of the plaintiff's proposed evidence in dispute would unfairly prejudice the defendants at trial. Therefore, the defendants' motion in limine as to exhibits P-4 in part (second claim), P-15, P-16, and P-26 is **GRANTED**. With regard to witnesses, the defendants' motion in limine is **GRANTED** as to the testimony of Samuel L. Jaynes, David Hill, Jim Matthews and Raymond

Belk that would relate to interrogatory nos. 5, 10(c), (d) and (e), and 12.

The court reserves ruling until trial on the remaining evidentiary objections raised in the instant motion and in the pretrial order.

Motion to Bifurcate

The defendants move to bifurcate the trial with one jury, pursuant to Rule 42 (b) of the Federal Rules of Civil Procedure into two phases as follows:

First, the issue of coverage under the liability policy;

Second, the bad faith and damages issues, including the plaintiff's claims for contractual, extra-contractual and punitive damages.

A decision to bifurcate issues "in further of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy" is within the trial court's discretion. O'Malley v. United States Fidelity and Guar. Co., 776 F.2d 494, 500 (5th Cir. 1985). Since the plaintiff has not responded to the motion to bifurcate, he has "failed to make any showing that [he] will be seriously prejudiced." Swofford v. B&W, Inc., 336 F.2d 406, 415 (5th Cir. 1964), cert. denied, 379 U.S. 962, 13 L.Ed.2d 557 (1965).

The court finds that the underlying contract claim under the liability policy is not so "interwoven with the [bad faith issues] that it cannot be submitted to the jury independently of the others without confusion and uncertainty, which would amount to a denial of a fair trial." Id. Cf. Nichols v. Shelter Life Ins. Co., 694 F. Supp. 218, 220, 221 (N.D. Miss. 1988) (insured alleged not only breach of contract but also fraudulent representation made by the insurer's agent that the insured's condition would not be considered preexisting under an exclusion clause of the policy). Since the plaintiff's bad faith claims involve the defendants' assignment of the separate property damage policy to another insurer and alleged delay in forwarding the claims under that policy to the assignee, the court finds that bifurcation is necessary to avoid confusion. The court further finds that bifurcation of the contract claim from the numerous claims for damages is necessary to avoid prejudice to the defendants.

Accordingly, the defendants' motion to bifurcate the contract claim from both the bad faith claims and the damages issues is **GRANTED**. The remaining claims of intentional infliction of emotional distress and intentional interference with business relations will be tried in the second phase.

SO ORDERED this, the _____ day of October, 1994.

NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE